

MAH SIEW SENG & ANOR

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v.

SEEMA DEVELOPMENT SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, IPOH

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LEE SWEE SENG JC

[ORIGINATING SUMMONS NO: 24-1807-2004 &
24-1990-2007]

10 JUNE 2013

CIVIL PROCEDURE: *Setting aside - Orders of damages - Assessment of damages in absence of defendant - Whether assessment of damages made on merits and evidence - Application to set aside orders or rehearing of assessment of damages - Delay of six years and three years in filing of applications - Whether orders might be set aside by court - Whether delay inordinate and unexplained - Rules of the High Court 1980, O. 37 r. 2*

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After successfully removing two of the defendant's caveats, the plaintiffs proceeded to have the Registrar assess the damages under s. 329(1) of the National Land Code ('NLC'). However, the defendant's solicitors did not attend both hearings of the damages assessments and in their absence, the damages were assessed to be RM253,426.63 for OS 24-1807-2004 and RM234,463.50 for OS 24-1990-2007. The amount assessed not having been paid, the plaintiffs proceeded to serve a winding up notice on the defendant. The defendant applied for *Fortuna* injunction to restrain the plaintiffs from filing the winding up petition but failed. Therefore, the defendants applied to set aside OS 24-1807-2004 ('encl. 20') six years later and 24-1990-2007 ('encl. 12') three years later or to rehear the assessment of damages. In supporting the applications, the defendant stated that it was unaware that its solicitors did not attend the hearing of the actions and that the solicitors acted unprofessionally in not objecting to the assessment of damages. The issues that arose for the court's determination in the applications were (i) whether the said orders might be set aside by the court; (ii) whether the reasons given for the absence of the defendant's solicitors were valid; (iii) whether there had been inordinate and unexplained delay in the defendant's applications to set aside the orders for damages; and (iv) whether the court would have arrived at the same decision as that of the Registrar even if it were to rehear the case.

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A Held (dismissing applications):

- B** (1) The Registrar, on the day fixed for the assessment of damages, proceeded with the hearing of the plaintiff's witness and evidence, having satisfied himself that the defendant's solicitors had been duly informed of the hearing date. Although the defendant's solicitors were absent, the orders of damages assessed were given after hearing the plaintiffs. Such being the case, it was an assessment of damages made on the merits and the evidence before the Registrar. The orders of damages assessed having been perfected, the court was *functus officio*. (paras 4 & 5)
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- D** (2) The court had the jurisdiction to set aside an order made in the absence of the other party although the Registrar had proceeded to hear the plaintiffs' witness and evidence and made the order of damages assessed accordingly. The defendant stated that it did not know that its solicitors did not attend the court on the dates fixed for hearing and that it was unprofessional of the solicitors not to object the assessment of damages. Such a statement of fact was not a reason explaining the absence of the solicitors. It was a lame excuse that was simply unacceptable. Even if it had been for the reason of having entered the wrong dates or that the solicitors had mistaken the correct date, it still did not explain why there was such a long delay in applying to set aside the order of the Registrar. The conduct of the solicitors were contumelious, cavalier and even callous. (paras 15, 16, 18 & 19)
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- G** (3) The defendant was way past the deadline. There was no doubt that the court would have a discretion to extend the time for such an application but cogent reasons must be given. The defendant's late application smacks of a lack of *bona fide* and an afterthought and was stained with scarlet from sitting and sleeping on its right. Such a long delay was deleterious and damaging to the defendant. Clearly, if the defendant itself had bothered to hound its solicitors on the progress of the case, it would not be haunted now by the lamentable lapses on the part of its solicitors. (paras 20 & 26)
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(4) Based on the principle enunciated in the case of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application*, there was no reason to disturb the orders of damages assessed and the certificates issued pursuant to the assessment of damages by the Registrar under O. 37 r. 2 of the Rules of the High Court 1980. The defendant and its solicitors were absent at the trial. The judge heard the evidence led by the plaintiffs. There was no evidence going the other way on either issue. (paras 38 & 39)

Case(s) referred to:

Coke & Coal Products (M) Sdn Bhd v. Hon Swee Kong & Ors [2000] 1 CLJ 19 HC (**dist**)

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA (**refd**)

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1 CA (**refd**)

Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application [2010] 3 CLJ 895 FC (**fol**)

Mawar Biru Sdn Bhd v. Lim Kai Chew [1992] 1 LNS 22 HC (**dist**)
Munusamy Karupiah v. Sang Lee Company Sdn Bhd & Ors [2010] 3 CLJ 924 CA (**refd**)

Public Finance Berhad v. Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 2 CLJ 646 HC (**refd**)

Legislation referred to:

Companies Act 1965, s. 218

National Land Code, s. 329(1)

Rules of Court 2012, O. 32 rr. 2, 5, 6, O. 35 r. 2(2), (3)

Rules of the High Court 1980, O. 32 r. 5(3), O. 35 r. 2(1),(2), O. 37 rr. 1, 2, O. 42 r. 13

For the applicant - T Manoharan; M/s Krish Mano & Assocs

For the respondents - Iruthaya Raj (Adam Teoh Kwok with him); M/s Ng Choo Beng R Naidu & Partners

Reported by Najib Tamby

JUDGMENT

Lee Swee Seng JC:

[1] The plaintiffs had successfully applied for the removal of the defendant's caveat on its land. The defendant/applicant here is Seema Development Sdn Bhd. After the caveat was ordered to be

A removed the defendant lodged another caveat on the same piece of land of the plaintiffs. The plaintiffs applied again to remove the second caveat of the defendant and was successful in doing so. The plaintiffs proceeded then to have the Registrar assess damages for the wrongful entry of both the caveats.

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Problem

C [2] Notice of appointment of the hearing of the assessment of damages was duly served on the solicitors for the defendant for the assessment in both actions. However the said solicitors did not attend the hearing of the assessment of damages for both the actions. Neither on 20 December 2006 for OS 24-1807-2004 nor on 13 May 2009 for OS 24-1990-2007. The Registrar proceeded to hear the plaintiffs and assessed the damages to be RM253,426.63 for OS 24-1807-2004 and RM234,463.50 for OS 24-1990-2007. The first caveat was on the land for about two years six months and the second caveat on land for about three years four months. The application to set aside the first order of court for damages was filed nearly six years after the order in OS 24-1807-2004 and the second application in OS 24-1990-2007 was filed some three years after the second order.

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Prayer

F [3] The amount assessed not having been paid, the plaintiffs proceeded to serve a winding-up notice on the defendant. The defendant applied for a *Fortuna* injunction to restrain the plaintiffs from filing a winding-up petition but failed. It was then that it applied to set aside the two orders for damages assessed by the Registrar or to rehear the assessment of damages. In OS 24-1807-2004 it is the defendant's application in encl. 20. In OS 24-1990-2007 it is the defendant's application in encl. 12. Both were heard together as the factual *substratum* was the same for both cases.

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Principle

H *Whether The Order For Damages Assessed After Hearing The Plaintiff And The Defendant Being Absent, May Be Set Aside By The Court.*

I [4] The Registrar on the day fixed for the assessment of damages proceeded with the hearing of the plaintiffs' witness and evidence, having satisfied himself that the defendant's solicitors had been duly informed of the hearing date. Though the defendant's counsel was absent, the orders of damages assessed were given after hearing the plaintiffs.

[5] Such being the case, it is an assessment of damages made on the merits and the evidence before the Registrar. The defendant now has filed applications to set aside the orders of damages assessed some six years later and in another case some three years later. The orders of damages assessed having been perfected, the court is *functus officio*.

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[6] Under the previous Rules of the High Court 1980 (“RHC”) there were limited instances when an order of court that has been perfected could be set aside by the same court as set out by the Court of Appeal in *Munusamy Karuppiah v. Sang Lee Company Sdn Bhd & Ors* [2010] 3 CLJ 924; [2010] 2 AMR 261. His Lordship Abdul Malik Ishak JCA at pp. 931-933 (CLJ); pp. 267-269 (AMR) summarised the position as follows:

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[2] The appeal raises an interesting point. It is whether JC2 can revise and amend the approved, sealed and perfected order of JC1. It turns on the application of the latin phrase *functus officio*. **It is trite that once the order of JC1 has been drawn up and perfected, it cannot be altered, varied or set aside because the court is *functus officio*.** In other words, having decided a question brought before JC1, JC1 is *functus officio*, and cannot review her own decision. *A fortiori* JC2 too cannot review JC1’s decision. It is as simple as that.

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[3] The aggrieved party on receipt of the order of JC1 has a legal remedy. It is by way of filing an appeal to the Court of Appeal. Section 67(1) of the Courts of Judicature Act 1964 enacts that the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. It is germane to mention that Mohamed Dzaiddin FCJ (later the Chief Justice of Malaysia) in *Lam Kong Co Ltd v. Thong Guan Co Pte Ltd* [2000] 3 AMR 3304; [2000] 4 MLJ 1; [2000] 3 CLJ 769, FC said that the Court of Appeal today no longer has any original jurisdiction after the repeal of s. 45 to 49 of the Courts of Judicature Act 1964 by the Courts of Judicature (Amendment) Act 1994 (Act A886) and what remains is its criminal and civil appellate jurisdiction. Recently His Lordship’s decision has been adopted by another panel of the Federal Court in the case of *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v. Fawziah Holdings Sdn Bhd* [2006] 3 AMR 725; [2006] 4 MLJ 113; [2006] 3 CLJ 177, FC. *Metramac* reiterated the obvious and that would be that the Court of Appeal possesses only appellate jurisdiction.

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- A [4] There are exceptions which allow JC2 to set aside or amend JC1's order without the need to file an appeal to the Court of Appeal and these exceptions are set out in the Rules of the High Court 1980 ("RHC") and in the relevant authorities. They may be stated as follows:
- B (a) Order 20 r. 11 of the RHC states that clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by summons without an appeal. This rule is now known as the "slip rule". Its applicability is rather limited. It is confined to cases where there has been clerical mistake or error arising from accidental slips or omissions committed by the officers of the court as envisaged in *In re Gist (A Person of Unsound Mind)* [1904] 1 Ch 398, as well as by the parties themselves as evidenced in the case of *Armitage v. Parsons* [1908] 2 KB 410, CA, or in a situation where there is a mistake as to the date like what had happened in the case of *In Re City Housing Trust, Ltd; Kolb v. The Co & Ors* [1942] 1 Ch 262. However, a caveat must be inserted. It is this. That the power to amend or vary an order must be exercised with the utmost care. It must be done judicially and not capriciously. It must be exercised in exceptional cases particularly where the justice of the case demands it. The error must be confined to an error in expressing what the court intended at the time when the order was made.
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- F (b) *A final order may be set aside or amended without the need to appeal in a situation where the order is made in the absence of the other party at the hearing as envisaged in Order 28 r. 4(1) of the RHC; Order 32 r. 6 of the RHC; and Order 35 r. 2 of the RHC.* It is interesting to read the case of *United Malayan Banking Corp Bhd v. Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546. That was a case where the court there was not *functus officio* but had all the powers to vary or revoke an *ex parte* order for sale if the court deemed it fit to do so. That case too also decided that an order that was made in an originating summons where the defendant was served but failed to enter an appearance and was absent at the hearing was held to be an order in the nature of an *ex parte* and that being the case it was held that the *ex parte* order can be set aside by means of a summons in chambers application without the need to go by way of an appeal.
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- I (c) In a situation where both parties had appeared and argued the matter, the Federal Court in *Scotch Leasing Sdn Bhd (In receivership) v. Chee Pok Choy & Ors* [1997] 2 MLJ 105 held

that the court would be *functus officio* upon the order being perfected and therefore the court cannot hear a summons in chambers to set aside an order for sale on the ground simply of lack of jurisdiction. It is pertinent to note that the Federal Court vigorously approved the case of *Muniandy a/l Thamba Kaundan & Anor v. Development and Commercial Bank & Anor* [1996] 1 AMR 908; [1996] 1 MLJ 374 notwithstanding the fact that that case was decided under the inherent jurisdiction of the court and not pursuant to the rigours of Order 28 r. 4(1) of the RHC.

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- (d) Order 32 r. 6 of the RHC states that the court may set aside an order made *ex parte*. This rule is a good piece of legislation because it protects the basic right of the litigants in that the party who has not been heard may apply to the court to have that order discharged forthwith (*Boyle v. Sacker* (1888) 39 Ch D 249 at 251; *Becker v. Noel & Anor*, *Practice Note* [1971] 1 WLR 803, CA; and *Tan Poey Kheng v. Ma Peng Kiat* [1984] 1 MLJ 58). It is trite law that a judge does not become *functus officio* after issuing an *ex parte* order. In an originating summons procedure under Order 28 r. 4(1) of the RHC, an *ex parte* order may be varied or revoked by a subsequent order of the court on such terms as it thinks fit. According to cases like *Lee Phet Boon v. Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448; and *Datuk M Kayveas v. PV Das* [1997] 4 AMR 3912; [1997] 3 MLJ 671, CA, an application to set aside an *ex parte* order is not an appeal and a court of co-ordinate jurisdiction may exercise the power to vary or revoke it.

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- (e) Order 35 r. 2(1) of the RHC states that any judgment or order obtained where one party does not appear at the trial may be set aside by the court, on the application of that party, on such terms as it thinks just. And according to Order 35 r. 2(2) of the RHC such an application must be made within seven days after the trial. Thus, according to the case of *Burgoine v. Taylor* [1878] 9 Ch D 1 at 5, where judgment was entered in the absence of the solicitor as a result of the solicitor's negligence in failing to look at the correct hearing list, the judgment may be set aside. (emphasis added)

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[7] The approach of the courts in hearing an application to set aside such an order that has been perfected has been approved and affirmed under a markedly different O. 32 r. 5 of the Rules of Court 2012 ("ROC") which reads:

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A Proceeding in absence of party failing to attend (O. 32, r. 5)

5(1) When any party to a notice of application fails to attend on the first or any resumed hearing thereof, the Court may proceed in his absence if, having regard to the nature of the application, it thinks it is expedient to do so.

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(2) Before proceeding in the absence of any party, the Court may require to be satisfied that the notice of application or, as the case may be, the notice of the time appointed for the resumed hearing was duly served on that party.

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(3) Where the Court hearing an application proceeded in the absence of a party, then, **whether or not an order made on the hearing has been perfected**, the Court, if satisfied that it is just to do so, may re-hear the application. (emphasis added)

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[8] This is to be compared and contrasted with the same provision in the Rules of the High Court 1980 which O. 32 r. 5(3) reads:

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(3) Where the Court hearing a summons proceeded in the absence of a party, then, provided that any order made on the hearing has not been perfected, the Court, if satisfied that it is just to do so, may rehear the summons.

[9] There is also the provision of O. 32 r. 6 of the ROC which provides:

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The Court may set aside an order made *ex parte*.

[10] The relevant provision for assessment of damages in this case when assessment was done is that of O. 37 r. 1 RHC which reads:

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1. Assessment of damages by Registrar (O. 37 r. 1)

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(1) Where judgment is given for damages to be assessed and no provision is made by the judgment as to how they are to be assessed the damages shall, subject to the provisions of this Order, be assessed by the Registrar, and the party entitled to the benefit of the judgment may, after obtaining the necessary appointment from the Registrar and at least 7 days before the date of the appointment, serving notice of the appointment on the party against whom the judgment is

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given, proceed accordingly.

- (2) Notwithstanding anything in Order 62, rule 10, a notice under this rule must be served on the party against whom the judgment is given. A
- (3) The attendance of witnesses and the production of documents before the Registrar in proceeding under this Order may be, compelled by writ of subpoena, and **the provisions of Order 35 shall with the necessary adaptations, apply in relation to those proceedings as they apply in relation to proceedings at a trial.** (emphasis added) B
- [11] As reference was made to O. 35 it would be helpful to set out O. 35 r. 2(1) both under the RHC as well as under the ROC as the application to set aside the order was made under the ROC though the time frame applicable for so doing was that under the RHC. Order 35 r. 2 RHC reads: C
2. Judgment, etc given in absence of party may be set aside (O. 35 r. 2) D
- (1) Any judgment or order obtained **where one party does not appear at the trial may be set aside by the Court**, on the application of that party, on such terms as it thinks just. E
- (2) An application under this rule must be made **within 7 days after the trial.** (emphasis added)
- [12] Order 35 r. 2 ROC has extended the time frame of seven days after the trial to 14 days and in sub-r. (3) has also spelt out the factors to be taken into consideration in deciding whether or not to set aside the judgment or order so obtained where one party does not appear. It reads: F
2. Judgment given in absence of party may be set aside (O. 35, r. 2) G
- (1) Any judgment or order obtained where one party does not appear at the trial may be set aside by the Court, on the application of that party, on such terms as it thinks just. H
- (2) An application under this rule shall be made **within fourteen days after the date of the judgment or order sought to be set aside** without prejudice, however, to the power of the Court to extend the period. I

- A (3) In considering an application made under this rule, the Court shall have regard to the following matters:
- (a) the **interest of justice**;
- B (b) whether the **absence of the applicant or counsel was deliberate, or due to an accident or mistake**;
- (c) the **prospects of success** of the applicant at trial;
- (d) whether there is any **delay** in making the application;
- C (e) whether the conduct of the applicant **has caused prejudice to the other party** which cannot be compensated by an order of costs. (emphasis added)

D [13] The factors to be taken into consideration appear to be a distillation of what has been set out in various cases as referred to below.

E [14] The considerations for setting aside a judgment entered after hearing witnesses and evidence in the absence of the other party are different from that of setting aside a judgment in default where no witnesses are called and evidence adduced. This approach has been confirmed by the Court of Appeal in *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1; [2009] 4 MLJ 610 at pp. 21-23 (CLJ); pp. 629-630 (MLJ). His Lordship James Foong FCJ observed:

F [17] We shall now return to the appeal proper. We start by stating that *in an application to set aside a default judgment due to non appearance of a party, a distinction must be made between one where such judgment was obtained without a trial having proceeded and one which did*. In the former, which covers default due to a failure to

G file an appearance after the writ was served or default of defence, the principle in *Evans v. Bartlam* [1937] AC 473 applies. It is basically: unless and until the court has pronounced a judgment upon the merits or by consent, it is to have power to revoke the expression of its coercive powers where that has only been

H obtained by a failure to follow any rules of procedure.

I And in *Burnes v. Kondel* [1971] 1 Lloyd's Rep 554 at p 444, Lord Denning MR expanded to say that a 'defence on the merits' means a defence which discloses an arguable and triable issue. In short, the court, as a general rule, will not set aside such default judgment unless the defendant can establish a defence on merit. This seems to be the predominant feature against the explanation for the default or for any delay in applying to set it aside.

[18] But when a judgment is entered after a trial has proceeded a different set of rules applies. In the English Court of Appeal case of *Shocked & Anor v. Goldschmidt & Ors* [1998] 1 All ER 372, the major factors to be considered to set aside such default judgment differ from that in *Evans v. Bartlam* in the order of priority and prominence. The reason for the absence of the party at the trial has become the 'predominant consideration' over that of a defence on merit. This can be observed from the judgment of Leggatt LJ when he said:

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision.

(2) Where judgment has been given after a trial it is the explanation for the absence of the absent party that is most important: unless the absence was not deliberate but was due to accident or mistake, the court will be unlikely to allow a rehearing.

(3) Where the setting aside would entail a complete retrial on matters of fact which have already been investigated by the court the application will not be granted unless there are strong reasons for doing so.

(4) The court will not consider setting aside judgment regularly obtained unless the party applying enjoys real prospects of success.

(5) Delaying in applying to set aside is relevant, particularly if during the period of delay the successful party has acted on the judgment, or third parties have acquired rights by reference to it.

(6) In considering justice between parties, the conduct of the person applying to set aside the judgment has to be considered: where he has failed to comply with orders of the court, the court will be less ready to exercise its discretion in his favour.

(7) A material consideration is whether the successful party would be prejudiced by the judgment being set aside, especially if he cannot be protected against the financial consequences.

(8) There is a public interest in there being an end to litigation and in not having the time of the court occupied by two trials, particularly if neither is short.

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A [19] Our courts have adopted this principle in *Abdul Rafar bin Maimunni & Anor v. HM Latiff bin KM Haneefa* [2008] 1 LNS 157 and *Ng Chek Kiam & Anor (Seng Heng Wholesale Fruit Dealer) v. Best Fruits Sdn Bhd* [2006] 1 LNS 267. We are of the view
B that this represents the current state of the law when dealing with an application to set aside a default judgment where a trial has proceeded and we shall apply this to the facts of this case. (emphasis added)

[15] It would appear that this court has the jurisdiction to set aside an order made in the absence of the other party though the
C Registrar had proceeded to hear the plaintiffs' witness and evidence and made the order of damages assessed accordingly. This court shall next proceed to consider if the reasons given for the absence of counsel representing the solicitors for the defendant is valid in the circumstances of the case.

D *Whether The Reasons Given For Absence Of Defendant's Counsel On Date Of Hearing Are Valid*

[16] The current solicitors who filed this application have not explained the reasons for the absence of the previous solicitors on
E the dates of hearing of the assessment of damages for wrongful entry of the caveats. All that the current solicitors and their client did was to state as a matter of fact that the previous solicitors did not attend court on the fixed date. The defendant has further
F stated that its solicitors did not attend court on the fixed date for hearing of the two applications unbeknown to the defendant who had trusted its previous solicitors to do all things necessary with respect to its representation in court. The defendant went on to state that its previous solicitors and in particular its counsel, Mr Kasturi Kesveren, acted unprofessionally in not objecting to
G the assessment of damages. Such a statement of fact is not a reason explaining the absence of counsel concerned in attending before the Registrar for hearing of the assessment of damages. Even if it be for the reason of having entered the wrong dates or that counsel had mistaken the correct date, it still does not explain
H why there has been such a long delay in applying to set aside the order of the Registrar. At any rate the conduct of the defendant's counsel is binding on the defendant. The Court of Appeal speaking through His Lordship James Foong FCJ in *Lembaga*

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Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors [2009] 5 CLJ 1; [2009] 4 MLJ 610 at pp. 23-24 (CLJ); pp. 631-632 (MLJ) had admonished as follows:

[21] This excuse offered by the defendants seem to lay the blame on an employee engaged by the defendants' solicitors who failed to enter into the diary the hearing date. But an employer is responsible for the action of his employee and so is **the conduct of the defendants' solicitors binding the defendants**. Undoubtedly, such callous act of the defendants' solicitors speaks very poorly of them. And such excuse has for the last decade become a common feature for an applicant to convince the court into granting him a retrial. But from authorities (*Mohd Yusof Mohamad v. Electrolux Home Centers Sdn Bhd* [1999] 2 CLJ 866; *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111; [1990] 1 CLJ (Rep) 606) such excuse has not been tolerated. This has in fact irked the court to remark in *Lim Soh Wah & Anor v. Wong Sin Chong & Anor and another appeal* [2001] 2 CLJ 344:

One of the fundamental duties of a solicitor is to diarise his cases, keep his client informed of the diarised dates and prepare the case with his client. The present instance is a case where there was a failure to discharge this rather fundamental obligation. As a result the clients suffered.

[22] We would further like to add that if the proprietors of the defendants' solicitors' firm were indifferent or had little interest in managing their firm properly by failing to devise a system to monitor and check on whether the duties or instructions given to its employee were carried out then this would amount to a deliberate act or defiance of a court order if such order were given to such employee and not complied with. This is no longer a mistake or an accident especially in this modern world of technology, where systems for monitoring compliance of duties imposed on staff and other members of an organisation are readily available in the market and have reached a sophisticated level. Poor management and the lack of care taken to record a hearing date can no longer be tolerated. (emphasis added)

[17] The plaintiffs in objecting to the applications have alluded to the fact that the plaintiffs' solicitors had written to the defendant's solicitors to inform them of the hearing date but in spite of that the defendant solicitors had failed to attend court. See para. 8(b) of the affidavit in reply (2) of the plaintiffs and exh. MSS 9 in OS 24-1807-2004 and correspondingly in para. 9(e) of the affidavit in reply (1) of the plaintiffs and exh. MSS 6 in OS 24-1990-2007. What happened here is not without precedent and in fact such a

A lackadaisical attitude is most lamentable and had received a stern rebuke in *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors* [2009] 5 CLJ 1 at p. 24; [2009] 4 MLJ 610 at pp. 631-632 in the Court of Appeal from His Lordship James Foong FCJ as follows:

B [23] Aside from the above, the plaintiffs have also adduced evidence, which is not rebutted by the defendants, that they have sent by letter of reminder to the defendants' lawyer of the hearing date. Though Encik Munir may have been careless in not entering this date into the diary such notification would have alerted other members in the defendants' solicitors' firm of the forthcoming event. And if they chose to ignore it then their reason for the absence of the defendants is inexcusable.

C [24] We would like also to mention that against the present judicial policy of strict adherence to hearing dates once set this excuse of the defendants attracts minimum tolerance from the court. Waste of judicial time and resources undermines the efforts of the judiciary's to eradicate the backlog of cases faced by the courts.

D [18] The reason given in this case is no reason at all in explaining the absence of the defendant's solicitors. It is a lame excuse that is simply unacceptable.

E *Whether There Has Been Inordinate And Unexplained Delay On The Part Of The Defendant In Filing The Applications To Set Aside The Order For Damages As Assessed*

F [19] Even granted that there had been an oversight, though not stated as such in the defendant's affidavits, one would have realised it soon enough to propel one to promptly apply to set aside the order of the Registrar. Here it can be concluded that the conduct of the said counsel had been contumelious, cavalier and even callous or to use a common expression, a couldn't care less attitude.

G [20] Whether the time frame be within seven days after the trial (as under the RHC O. 35 r. 2(2)) or within 14 days after the date of the judgment or order sought to be set aside (as under the ROC O. 35 r. 2(2)), the defendant is way past the deadline. No doubt the court would have a discretion to extend the time for such an application to be made but cogent reasons must be given. The defendant sought to blame the then counsel Mr Kasturi Kesveren on the ground that perhaps he had problem

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with his practising certificate but evidence from the Bar Council letter exhibited in the affidavit of the plaintiffs was that the said solicitor was only struck off the roll on 21 May 2010 when the order for award of damages had been made on 20 December 2006 for the first wrongful entry of caveat in OS 24-1807-2004 and on 13 May 2009 for the second wrongful entry of caveat in OS 24-1990-2007. As both applications to set aside the order were filed only on 16 November 2012, the unexplained delay was thus about six years and three years respectively. The reason actually is not difficult to find: it was after the plaintiffs had served a notice under s. 218 of the Companies Act 1965 for the winding-up of the defendant and after the defendant had failed in its *Fortuna* injunction application to restrain the plaintiffs from so presenting the petition to wind-up the defendant after the expiry of 21 days from the service of the said notice on the defendant. Thus the defendant's late application smacks of a lack of *bona fide* and an afterthought and is stained with scarlet from sitting and sleeping on its right, inviting laches like leeches to suck dry any life-giving blood left, leaving the defendant to languish. Such a long delay is deleterious and damaging to the defendant. Indeed time and tide wait for no man.

[21] In refusing to set aside a judgment in default regularly entered which application was made some two and half years later, His Lordship Edgar Joseph Jr SCJ (as he then was) in *Public Finance Berhad v. Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 2 CLJ 646 at p. 653; [1994] 1 MLJ 495 at pp. 506-507 made the following observations on laches and a lack of candour in explaining delay as follows:

In *Malaysia Building Society Bhd v. Lim Kheng Kim* [1988] 3 MLJ 175 at p 184 col 2H, when dealing with the subject of delay in the context of a similar situation, I had held that a delay of one year and two months in applying to set aside a default judgment gave rise to an inference of laches. In this context, the case of *Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor* [1986] 1 CLJ 417 at p 419 para 3, also merits reading. I appreciated, however, that it was a question of fact in each case, whether the delay involved was so inordinate as to show that a party has been guilty of laches.

- A It is also clear law that a defendant who is seeking the indulgence of the court to set aside a default judgment should make full, frank, candid and honest disclosure of all the relevant facts. (See *Hong Leong Equipment Sdn Bhd v. Manfo Development Sdn Bhd & Anor.*)
- B In these circumstances, the inevitable conclusion at which I had arrived was that the second and third defendants had been **guilty of laches, their conduct had not been bona fide and there had been a deplorable lack of candour on their part.** (emphasis added)
- C [22] Even if one were to go by the time frame in O. 42 r. 13 RHC, it is no help either. It reads:
13. Setting aside or varying judgments and orders. (O. 42 r. 13)
- D Where in these Rules provisions are made for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the order or judgment **within thirty days after the receipt of the order or judgment by him.** (emphasis added).
- E [23] The order of the damages assessed was served on the defendant on 6 February 2007 for the first caveat and on 1 September 2009 for the second caveat as admitted by the defendant itself thus giving an unexplained delay of nearly six years
- F and three years respectively since the applications were filed only on 16 November 2012.
- G [24] The strictures issued in the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 MLJ 223 by His Lordship Gopal Sri Ram JCA (as he then was) are worthy of repetition as history has a way of repeating itself in as much as history has shown that man has learned nothing from it. When delivering the judgment for the Court of Appeal His Lordship dwelt on the point of delay as follows at pp. 401-402 (CLJ); p. 229 (MLJ):
- H The delay point
- It is a cardinal principle of law, that **when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously.** The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, **a court may refuse relief to an indolent litigant.**
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In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

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The point that is presently under consideration has been authoritatively stated in *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30. It is a decision of the Federal Court and therefore quite plainly binds this court. There, Edgar Joseph Jr FCJ, said (at p. 36):

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The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms. Having said that it should be added that the application to set aside such a judgment should be made: (a) with reasonable promptitude, in other words within a reasonable time; and (b) before the defendant has taken any fresh step after becoming aware of the irregularity. (See O. 2, r. 2(i) of the Rules of the High Court, 1980.) (emphasis added).

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[25] In determining whether the explanation given in *Khor Cheng Wah's* case (*supra*) was reasonable His Lordship Gopal Sri Ram JCA (as he then was) said thus at p. 402 (CLJ); pp. 229-230 (MLJ):

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In the present case, the explanation of the fourth defendant for the delay in making his explanation is, to summarize his affidavits, that he placed the conduct of his defence in the hands of a solicitor who did little to protect his client's interests.

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Is that a reasonable explanation? The learned judge did not think it was. And I agree with him. Undoubtedly, this court will not, whenever feasible, allow a client to suffer for the negligence of his solicitor: see, *Cheow Chew Khoo v. Abdul Johari bin Abdul Rahman* [1995] 1 MLJ at p. 490 per VC George JCA. But there are limits to what may be done in the interests of justice. After all, justice is not only for a defaulting defendant: it is for the plaintiff as well. And at the end of the day, a careful examination of the facts and circumstances reveals that *the fourth defendant did nothing to communicate with his solicitor at any earlier point in time to discover the state in which the litigation against him stood. Surely, it would be injustice to visit the consequences of his indifference upon the plaintiff's head.* (emphasis added)

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- A [26] If in a case of an irregular judgment or order, reasonable promptitude is required, how much more in a case of a regular order made in this case. Clearly if the defendant itself had bothered to hound its solicitors on the progress of the case, it would not be haunted now by the lamentable lapses on the part of its solicitors.
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- [27] The Federal Court in affirming the majority decision in the Court of Appeal case of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor (supra)* reiterated as follows in *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application* [2010] 3 CLJ 895 at p. 902:
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- [8] Before we conclude there is a matter to which we must allude. It is well known that courts at all levels are saddled with an enormous amount of work. Judicial arbiters are working very hard to clear the backlog. What we must aim for is a trial that takes place a few months and not several years after the commencement of the action. Counsel on all sides must cooperate to achieve this. *Diligence in diarising dates is essential. We think it safe to say that gone are the days when the absence of a solicitor or counsel or a party on the hearing date will be looked upon with lenience. Quite the opposite. There must be good grounds for postponing a trial or for setting aside a judgment obtained by reason of the absence of a party or its counsel at trial.* That is not to say that a trial ought never to be postponed or that a judgment entered in the absence of a party ought never to be set aside. Each case depends on its own facts and what the judicial arbiter must always bear in mind is the justice of the particular case. We cannot over emphasise that justice is too precious a commodity to be sacrificed at the altar of expediency. (emphasis added)
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- [28] Even assuming for a moment a total lack of interest on the part of the previous solicitors to defend the defendant where assessment of damages for wrongful entry of caveats are concerned, there is still the unexplained delay of nearly six years and three years respectively in the two applications filed that created a chasm chronologically speaking that cries out for an explanation which explanation has not been forthcoming.
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Whether This Court Would Have Arrived At The Same Decision Even If It Were To Rehear The Case

- [29] As the defendant solicitors did not attend in the hearing for assessment of damages for wrongful entry of caveat on both occasions, the Registrar proceeded to assess damages suffered by
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the plaintiffs for the length of time the caveats were on the land. The claim for damages was made under s. 329(1) of the National Land Code which reads:

(1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

[30] For OS 24-1807-2004 the following evidence was adduced by the first plaintiff Mr Mah Siew Seng as seen in his witness statement exhibited as exh. M1 in the affidavit of Manoharan a/l Tevadasin in encl. 31. Briefly the evidence can be summarised as follows:

I am one of the administrators of the estate of my father the late Mah Khin Kee. My father owned a property known as Lot 18770 in the Mukim of Durian Sebatang, Daerah Hilir Perak. I applied for conversion and subdivision of the said land. The Pejabat Tanah Dan Galian Perak had approved the subdivision of the property for a housing scheme by their letter of 30 September 1998 (Enclosure 12). Following the approval I submitted the layout plans. The plans were approved. There was also a letter from the Jabatan Perancang Dan Desa Perak dated 18 December 2003 giving formal approval of the layout plans for the housing scheme. The approval was initially valid for one year and with a further period of extension to be allowed by the government for another year. Once the layout plans are approved the title would be surrendered to the government for subdivision under the National Land Code.

The title cannot be submitted for subdivision when there is a caveat against the title. The Defendant's caveat was on the said land and so we applied to Court for removal of the caveat. As a result of the delay in getting the caveat removed, the approval lapsed.

After the caveat was removed we still could not submit the title for subdivision because the Defendant entered a second caveat. I was unable to surrender the title for subdivision and there is going to be further delay and there is a possibility that the government may withdraw the earlier approval given or even imposed additional conditions. The object of subdivision was to develop the land into a housing estate. According to the approval given by the government there were 12 units of houses that were allowed to be constructed on the land consisting of 6 individual

A bungalows and 6 semi-detached units. The land is right in the midst of highly developed housing estates. Further infrastructure is well laid and the place ripe for development. There was no difficulty at all in finding purchasers.

B The effect of the Defendant's caveat was that we cannot proceed with the development of the land and everything hangs in the balance.

C I have experience in developing properties. Though I am an accountant by profession, my family is involved in development of properties in and around Teluk Intan. Even if the property is not developed by me, other developers would be able to buy the vacant lots and I would be able to sell the individual lots in 2003. The market rate is about RM20.00 per sq foot. The area has access to power and other utilities like water and electricity supply.

D It is difficult to say when the fresh approval will be given and when the project will start and it is difficult to forecast the market conditions say 3 to 5 years' time. So the only safe method of assessing damage is to calculate the loss of interest on a compound basis, based on the proceeds of the sale of the undeveloped lots as approved by the government in 2003.

E The going rate for the land per sq foot in the Valuation Report of JS Valuers Property Consultants (Perak) Sdn Bhd dated 7 December 2006 produced herein is about RM20 per sq foot. The land approved by the government is 58,251 sq feet. Assuming that I was in a position to surrender the land in 2003 and I managed to sell the individual 12 lots, the proceeds of sale would be 58,251 sq ft X RM20 psf = RM1,165,020.

F The caveat was entered by the Defendant on 23 July 2003 and was removed by an order of Court on 13 February 2006, a delay of 2 years 6 months and 20 days.

G The calculation of loss of interest for the period of delay is set out as follows:

H	1. Loss of interest for 1st year - 8% p.a. X RM1,165,020.00	RM 93,201.60
	2. Loss of interest for 2nd year - 8% p.a. X RM1,258,221.60.	RM100,657.72
I	3. Loss of interest for 6mths 20days - 8% p.a. X RM1,358,879.32.	RM 59,567.31
	Total.	RM253,426.63

The amount I am asking is minimal. As I have said earlier, if I develop the property and sell the individual units as completed units with buildings the profit would be many times more. The Defendant by entering a second caveat has no respect for the Court order and I would ask the Court to take this conduct into account by ordering aggravated damages against the Defendant.

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[31] As for the evidence given in OS 24-1990-2007, the evidence was substantially the same except with the following additional facts which can be summarised as follows:

The caveat was removed by an order of court dated 13 February 2006. Thereafter the Defendant entered a caveat again on 7 March 2006 in defiance of the court order. The caveat was removed by the Court on 3 July 2008. If not for the caveat the Plaintiffs would have gone ahead and develop the land because the Plaintiffs have sufficient experience and resources in development. Even if the land is not developed we would have sold the land to prospective purchasers as vacant lots. JS Valuers Property Consultants (Perak) Sdn Bhd in its Valuation Report dated 23 December 2008 valued the 12 lots at RM1,680,000 (marked as P3). The calculation for the loss of opportunity to earn interest from the proceeds of sale is as set out in P4. The current bank interest is about 6% per annum. The calculation is as follows:

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Estimated proceeds from sale of sub-divided lots as per Valuation Report RM1,680,000.

Loss of interest for 849 days:

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1. Loss of interest for 1st year - 6% p.a. X RM1,680,000	RM100,800
2. Loss of interest for 2nd year - 6% p.a. X RM1,680,000	RM100,800
3. Loss of interest for 119 days - 6% p.a. X RM1,680,000	RM 32,863.56
Total	RM234,463.56

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[32] I can see nothing wrong with that method of assessing loss in a case where the plaintiffs are developing the said land and have no difficulty selling the subdivided lots and further have supported the market value with a valuation report. I am not unaware of the case of *Coke & Coal Products (M) Sdn Bhd v. Hon Swee Kong & Ors* [2000] 1 CLJ 19. However the factual matrix in

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- A *Coke & Coal Products* is quite different from the present case. There because of the presence of the caveat, the loan raised by the plaintiff from its bank had been cancelled. However by that time it had already paid the full purchase price of the land. The assessment was based on the fact that had the loan of RM2.5 million from the bank been released to the plaintiff, the plaintiff would have earned interest on it presumably from keeping the same in fixed deposit at the rate of 8% per annum from July 1990 to July 1991. However that is unrealistic as the interest on the loan which the plaintiff would have to pay the bank would have been higher than the interest earned on fixed deposit!

- D [33] In our present case, it was foreseeable by the defendant that the plaintiffs would not be able to dispose of the land that they had applied for development layout plans and for subdivision because of the defendant's caveat on the land. In encl. 16 in OS 24-1990-2007 which is the first plaintiff's affidavit and in exh. MSS2 is found the notice dated 26 May 2006 from the plaintiffs' solicitors to the defendant and also to two directors of the defendant, putting them on notice as follows:

- E As a result of the lodging of the caveat on the 7-3-2006 our clients are unable to proceed with the sub-division of the land and your act has caused further damage and loss and our clients hold you liable for it.

- F [34] In *Mawar Biru Sdn Bhd v. Lim Kai Chew* [1992] 1 LNS 22 it was held that the caveatee and a third party purchaser had mutually agreed to terminate the sale and purchase agreement because of the caveat. When such a contractual right had been terminated, the caveatee cannot utilise the agreement to support his claim based on the theory 'as if the money is being received' when in fact the contractual obligation to pay had ended.

- H [35] However in our present case the evidence led was that the plaintiffs had no problem disposing of the 12 lots to prospective buyers but for the caveat on the land. Any prudent purchaser doing a search on the land would see the presence of the defendant's caveat and therefore would be deterred from purchasing.

- I [36] It would be unrealistic for the defendant to say that the plaintiffs must be able to show diminution in value of the property after the caveat had been lifted. The court can take judicial notice that land near to towns with ready access to infrastructure and

utilities and other developments can only appreciate in value with the passage of time. It is not open to the defendant to say that it is indirectly doing the plaintiffs a favour by preventing them from selling the land now so that they can sell it in the future when its caveat has been removed and then for a better price! The court should also guard against unwittingly sending a message to caveators that they can willy-nilly caveat lands of others and all these caveators need to pay is the costs in removing the said caveat.

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[37] It must not be forgotten that a registered owner of a land has the absolute right to deal with his land howsoever and whensoever he pleases. He does not have to account to anyone for what he would do whether by way of lease, sale or charge. When that right is being taken away by the presence of a caveat against his land, surely he is entitled to damages. If he should decide to sell and at market price supported by a valuation report, it is not for others to question the wisdom of his decision. In such a case as here, where as a developer, the plaintiffs are in the business of selling of sub-divided lots, it would not be unfair to take the interest that they would have earned as their loss had the lots been sold, for like all developers there is always that element of holding costs if the lots are not sold. It is not for others and least of all by the caveator to question the plaintiffs timing of the sale.

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[38] It would be apposite to reproduce the remarks made by his Lordship Gopal Sri Ram FCJ in the Federal Court case of *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v. Awang Soh Mamat & Ors and Another Application* [2010] 3 CLJ 895 for it has relevance to the issue of assessment of damages in the absence of evidence from the party absent as follows at pp. 900-901:

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[5] Learned counsel for the applicants sought to argue that his clients were seriously prejudiced because the judge had acted upon an allegation of fraud that must be proved beyond a reasonable doubt. Also, the judge had made an award of damages which had never been proved. He referred us to the well known *dictum* of Lord Goddard LCJ in *Bonham-Carter v. Hyde Park Hotel* [1948] 64 TLR 177 at p. 178 where he said:

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- A In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars and throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages'. He has to prove it.
- B We were also referred to other cases where this principle was applied and damages reduced. See, for example, *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15 FC. But if you look at those cases carefully enough, they were instances where the issues of liability and quantum were bitterly contested. This is not such a case.
- C [6] Here, the applicants and their legal advisers were absent at the trial. The judge heard the evidence led by the respondents on the issue of liability and, acting in accordance with settled adjectival law, accepted it. He also believed the evidence led in respect of quantum. He had no evidence going the other way on either issue. So you really cannot blame the judge for acting on the evidence before him. The applicants' complaint of a failure of justice is therefore without any substance. Of course, the award made by the learned judge in this case does not constitute a precedent for future cases. It is strictly confined to the facts here.
- D And those facts are that the applicants were absent so that there was no cross examination of the respondents' witnesses and no evidence led to contradict the material placed by the respondents before the court.
- E [39] Based on the same principle as enunciated above, I see no good reason to disturb the orders of damages assessed and the certificates issued pursuant to the assessment of damages by the Registrar under O. 37 r. 2 of the RHC.
- F **Pronouncement**
- G [40] Based on the principles of law as discussed above and applying them to the factual matrix of these two cases which applications to set aside the orders for damages assessed or to rehear the assessment are in encl. 20 for OS 24-1807-2004 and encl. 12 for OS 24-1990-2007, I had dismissed both applications with costs of RM5,000 each to be paid by the defendant to the plaintiffs.
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[41] In the light of the above decisions the applicants had also withdrawn encls. 28 and 23 respectively being applications for stay of the assessment of damages order given by the Registrar on 20 June 2006 and 13 May 2009 respectively and so both applications were struck out with no order as to costs.

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